Supreme Court, U.S.
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No. 00-5961

In The

Supreme Court of the United States

MELVIN TYLER,

Petitioner,

versus

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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9/10/98 MINUTE ENTRY (9/8/98): ORDERED that petitioner's suit is dismissed w/prej by Judge Morey L. Sear (nn) [Entry date 09/11/98]

9/17/98 JUDGMENT: ORDERED that pl's cmp is dismissed w/prej by (LGW, Clerk) approved by Judge Morey L. Sear Date signed: 9/16/98

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-00165

IN RE: MELVIN TYLER,

Movant.

Motion for an order authorizing the United States District Court for the Eastern District of Louisiana to consider a successive habeas corpus application

(Filed Apr. 29, 1997)

Before KING, JOLLY, and DENNIS, Circuit Judges.

BY THE COURT:

Melvin Tyler, #81668, has moved this court for an order authorizing him to file a successive 28 U.S.C. § 2254 application in the district court. *See* § 2244 (b) (3) (A). Tyler has made a prima facie showing that he meets the requirements of § 2244 (b) (2). Therefore, IT IS ORDERED that Tyler's motion for authorization to file a successive § 2254 application addressing the issues whether *Cage v. Louisiana*, 498 U.S. 39 (1990) should be applied retroactively on collateral review and whether the jury instruction on reasonable doubt given to his jury was unconstitutional under *Cage* and *Victor v. Nebraska*, 511 U.S. 1 (1994) is GRANTED.

MINUTE ENTRY
SEAR, CHIEF JUDGE
September 8, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MELVIN TYLER	*	CIVIL ACTION
VERSUS	*	NO. 97-1549
BURL CAIN, WARDEN	*	SECTION "G"

MEMORANDUM AND ORDER

(Filed Sep. 10, 1998)

Background

Petitioner Melvin Tyler, a prisoner currently incarcerated in the Louisiana state Penitentiary, Angola, Louisiana, was convicted on February 19, 1976 of one count of second degree murder and sentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence. Tyler directly appealed his conviction to the Louisiana Supreme Court.[1] Following that appeal, he was resentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence for a period of twenty (20) years.

Tyler subsequently filed six (6) applications for post-conviction relief in state court, all of which were denied.

[1] The petitioner raised the following arguments on appeal: 1) the trial court improperly denied his Motion to Quash an improper grand jury; 2) the trial court gave an unconstitutionally excessive sentence; and 3) the trial court gave an improper jury instruction on specific intent. *State v. Tyler*, 363 So. 2d 903 (La. 1978).

In his petition for federal habeas relief. Tyler raises the same two claims he raised in his final post-conviction application in state court. Prior to filing the federal petition. Tyler obtained permission from the United States Fifth Circuit Court of Appeals to file a successive writ.[2] The Fifth Circuit, however, limited his application to the issue of whether *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990) and *Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239, 127 L.ed.2d 583 (1994) should be applied retroactively on collateral review, and, if so applied, whether the jury instruction given at Tyler's trial was unconstitutional.[3]

Magistrate Judge Louis Moore, Jr. issued a Report and Recommendation in which he recommended that Tyler's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be denied. Because petitioner has filed timely objections to the magistrate's Report and Recommendation, a *de novo* review of those portions of the findings to which petitioner has objected is required.

Analysis

The first issue to be considered is whether *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990) and *Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239, 127 L.ed.2d 583

[2] *In re Melvin Tyler*, Doc. No. 97-00165 (U.S. App. 5th Cir. 1997).

[3] *Id.*

(1994) should be applied retroactively on collateral review of Tyler's case.[4]

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[4] In determining this, I am not limited solely to United States Supreme Court determinations on its retroactivity as in *In re Smith*, 142 F.3d 832. In *Smith*, petitioner was seeking writs from the Fifth circuit to file for a successive habeas application based on a similar allegedly unconstitutional "reasonable doubt" jury charge. In *Smith*, the Fifth Circuit adopted the view that:

> an application to file a second or successive habeas petition must point to a *Supreme Court decision* that either expressly declares the collateral availability of the rule (such as by holding or stating that the particular rule upon which the petitioner seeks to rely is retroactively available on collateral review) or applies the rule in a collateral proceeding.

Id. at 835, (emphasis added).

The Fifth Circuit additionally stated that Smith was required to make a "prima facie showing" that the *Cage* rule has been "made retroactive to cases on collateral review by the Supreme Court" as required by § 2244(b)(2)(A).

However, it is not before me to decide whether Tyler is permitted to file this successive *habeas* application in accordance with 28 U.S.C. § 2244(b)(2)(A). The Fifth Circuit has already granted him permission to do so. Nonetheless, they have limited his application to the issue of whether *Cage v. Louisiana*, 498 U.S 39, 111 S.Ct. 328 (1990) and *Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239, 127 L.ed.2d 583 (1994) should be applied retroactively on collateral review of his case and if so applied, whether the jury instruction given at Tyler's trial was unconstitutional.

Since I am not deciding whether to grant an application to apply for successive writs, I am not governed by 28 U.S.C. 2244(b)(2)(A). Thus, I am not limited to Supreme Court determinations on this issue as *Smith* was.

Since the time the Fifth Circuit granted authorization for Tyler to file his *habeas* application, that court had an opportunity to rule on the issue of whether *Cage* and *Victor* should be applied retroactively on collateral review. In *Humphrey v. Cain*, 138 F.3d 552 (5th Cir. 1998), adopting the panel opinion, 120 F.3d 526 (5th Cir. 1997), the Fifth Circuit en banc held that *Cage*, as clarified by *Victor*, announced a new rule of constitutional law made retroactive to cases on collateral review. *Id.* and *See Messick v. Cain*, 1998 WL 473942, (E.D. La).

Therefore, the only remaining question is whether the jury instruction given at Tyler's trial was unconstitutional. In *Cage*, the Supreme Court held that an instruction containing questionable reasonable doubt language was unconstitutional, because it permitted finding guilt based upon a degree of proof below that required by the Due Process Clause of the Fourteenth Amendment.

Tyler claims the trial court erroneously instructed the jury on reasonable doubt, and that this instruction violated the Fourteenth Amendment's due process clause by reducing the state's burden of proof against him, as discussed in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) and *Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239, 127 L.Ed. 583 (1994).

Cage and *Victor* set the standard by which courts examine the "reasonable doubt" instructions. *Cage* and *Victor* affirmed the principle that the charge must not allow the jury to convict unless it is convinced that the evidence demonstrates guilt beyond a reasonable doubt. *Victor* modified *Cage* by leaving no uncertainty that the inquiry is "not whether the instruction 'could have' been

applied in [an] unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it."[5]

Using this standard, the Fifth Circuit decided *Humphrey v. Cain*, 138 F.3d 552. In *Humphrey*, the Fifth Circuit sitting en banc held that the complained-of reasonable doubt instruction was unconstitutional, over-ruling prior cases. The jury charge given at Tyler's trial is identical to the charge on reasonable doubt given in *Humphrey*. The issue in this case is whether Tyler's *habeas* application was filed too late to apply the *Humphrey* ruling.

In *Humphrey*, the petitioner filed his habeas application prior to the April 24, 1996 effective date of the Anti-terrorism and Effective Death Penalty Act (AEDPA), which established a new standards of review for state court decisions in habeas cases. Thus, Humphrey's claims were analyzed under the old version of the habeas statute. The court noted this distinction in *Humphrey* when it stated.

> Prisoners who file petitions after April 24, 1996, must surmount the formidable barriers erected by the Antiterrorism and Effective Death Penalty Act. Of course, we do not have the occasion to measure how high those barriers might be. We note only that the . . . heightened standard of review for state prisoners, see 28 U.S.C. § 2254(d)(1), could shut out future petitioners in Humphrey's situation.

Tyler's petition here was filed on March 18, 1997, after the April 24, 1996 effective date of AEDPA. Hence,

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[5] *Humphrey v. Cain*, 120 F.3d 526, 531.

in order for Tyler to prevail, he must surmount the "formidable barriers" erected in 28 U.S.C. § 2254(d)(1).[6] In other words, Tyler must show the state court decision denying him relief on his *Cage* and *Victor* claim was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."

In petitioner's objections to the Magistrates Report and Recommendations, petitioner urges the court to use the *Humphrey* decision to grant him relief. Since *Humphrey* was decided under a different habeas standard than the one that applies in this case, *Humphrey* is inapplicable.

In reviewing petitioner's reasonable doubt instruction, I find his claim unavailing under *Cage* and its progeny in light of the standards governed by AEDPA. The disputed instruction in this case reads as follows:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you

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[6] 28 U.S.C.§ 2254 provides:

> Whether jury instruction is unconstitutional and whether a new rule of law is to be applied retroactively are questions of law. On a question of law, this Court may not grant habeas relief with respect to a state court's determination unless the "state court's decision rested on a legal determination that was 'contrary to . . . clearly established Federal law, as determined by the Supreme Court.' " 28 U.S.C. § 2254 (d) (1). *Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059 (1997).

must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a *moral certainty* of the defendant's guilt. If after giving a fair and impartial consideration of all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.

The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It should be an *actual or substantial doubt*. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt, *for which you could give good reason*. (Emphasis added.)

This instruction defined reasonable doubt through the use of phrases that have been disapproved in the past, including "grave uncertainty," "moral uncertainty," and "actual or substantial doubt," combined with the explanation that the jury could acquit only if it had "serious doubt, for which you could give good reason."

Petitioner argues that this "good reason" limitation on reasonable doubt, in conjunction with other errors, lowered the standard of proof required by due process.

In analyzing this charge under a more stringent AEDPA standard, the charge is able to pass constitutional muster. Terms such as "substantial basis" in connection with "grave uncertainty" has been recently allowed by the Fifth Circuit, as has "grave uncertainty" used with "moral certainty". *See Weston v. Ieyoub*, 69 F.3d 73 (5th Cir. 1995); and *Gaston v. Whitley*, 67 F.3d 121 (5th Cir. 1995), cert. denied, 518 U.S. 1023, 116 S.Ct. 2561, 135 L.Ed.2d 1078 (1996). The Fifth Circuit has also upheld instructions using the phrases "substantial doubt" together with "moral certainty." *Schnider v. Day*, 73 F.3d 610 (5th Cir. 1996); and *Bias v. Ieyoub*, 36 F.3d 479 (5th Cir.1994).

Moreover, other circuits have refused to reverse convictions with articulation demanding reasonable-doubt instruction such as the one in this case. *See Chalmers v. Mitchell*, 73 F.3d 1262, 1268-69 (2d Cir. 1996); ___ U.S. ___, 117 S.Ct. 106, 136 L.Ed.2d 60 (1996); *Beverly v. Walker*, 118 F.3d 900 (2d Cir.1997); and *Vargas v. Keane*, 86 F.3d 1273, (2d Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 240, 136 L.Ed.2d 169 (1996). The Second Circuit held that an instruction survived due process scrutiny in spite of its characterization of reasonable doubt as "doubt for which you can give a reason if called upon to do so by a fellow juror in the jury room." *Vargas* at 1277-79.

In *Humphrey* these three phrases read in connection with the good reason limitation was found to deny the petitioner a constitutional jury trial. They found that this jury instruction

> "define[d] reasonable doubt with all the phrases that (although panned by the Court) survived constitutional attack in Victor, but [they] are coupled with an additional potent qualifier. Arguably, jurors were not allowed to entertain doubt without being able to express a good reason. The abiding conviction of guilt to a moral certainty could abide only if the juror could offer a good explanation."
>
> *Humphrey* at 531.

The *Humphrey* court, in determining the instruction's constitutionality, used the more relaxed standard in *Victor*.[7] However, when analyzing this charge under a more stringent AEDPA standard, petitioner is not able to surmount the formidable barriers erected by the Anti-terrorism and Effective Death Penalty Act.

Therefore, after reviewing the record and the report of the Magistrate Judge, I find that the state court decision denying Tyler relief was not contrary to any clearly established federal law. Accordingly, Tyler's petition for habeas relief is denied.

After a de novo review of the record, the applicable law, the Report and Recommendation of Magistrate Judge Moore, and Plaintiff's objections to the report, I approve the Magistrate Judge's Report and Recommendation and adopt it as my opinion.

Accordingly,

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[7] *Messick* at 3.

IT IS ORDERED that plaintiff's suit is DISMISSED WITH PREJUDICE.

/s/ Morey L. Sear
MOREY L. SEAR
CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31159
Summary Calendar

MELVIN TYLER,

Petitioner-Appellant,

versus

BURL CAIN, Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana USDC No. 97-CV-1539-G

(Filed Jun. 01, 2000)

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Melvin Tyler, Louisiana prisoner # 81668, appeals the dismissal of his petition under 28 U.S.C. § 2254. In 1976, Tyler was convicted of one count of second degree murder. He is continuing to serve his sentence of life imprisonment without the benefit of parole, probation, or suspension of sentence for a period of twenty years.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Tyler has requested federal habeas relief following the denial of his numerous state habeas petitions. This court has previously given Tyler permission to file a successive § 2254 application on the issues whether *Cage v. Louisiana*, 498 U.S. 39 (1990), should be applied retroactively on collateral review and whether the jury instruction on reasonable doubt given to his jury was unconstitutional under *Cage* and *Victor v. Nebraska*, 511 U.S. 1 (1990). The district court determined that, based upon *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.) (en banc), *cert. denied*, 119 S. Ct. 348, 365 (1998), *Cage* was to be applied retroactively, but it denied relief under the standard set forth by 28 U.S.C. § 2254(d).

The district court erred in not determining first whether Tyler's petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244 (b) (2) (A). Procedurally, this case is governed by *Brown v. Lensing*, 171 F.3d 1031 (5th Cir. 1999), which relies on *In re Smith*, 142 F.3d 832 (5th Cir. 1998). Under circumstances indistinguishable from this case, petitioner Brown was denied successive habeas relief because he could not show that any Supreme Court decision renders the *Cage* decision retroactively applicable to cases on collateral review, as AEDPA now requires. Moreover, the *Brown* case specifically disapproved the district court's approach in this case. *Brown*, 171 F.3d at 1032 n.9.

Like cases demand like treatment. Tyler's successive petition fails according to *Brown* and § 2244 (b) (2) (A).

For these reasons, only, the judgment of the district court denying habeas relief is AFFIRMED.